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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

10 IN RE: Case No. 2:07-CV-892-RCJ-GWF-BASE  
11 USA COMMERCIAL MORTGAGE Consolidated with Case Nos.  
12 COMPANY,  
13 Debtor. 2:07-cv-1389-RCJ-GWF  
14 3685 SAN FERNANDO LENDERS, LLC, 3:07-cv-00241-RCJ-GWF  
et al., 2:07-cv-00894-RCJ-GWF  
15 Plaintiffs,  
16 v.  
17 COMPASS USA SPE, LLC, et al.,  
18 Defendant.  
19

**COMPASS DEFENDANTS' OBJECTION TO PROPOSED  
ORDER SETTING SUPERSEDEAS BOND AMOUNTS TO  
STAY EXECUTION OF JUDGMENT PENDING APPEAL**

23 Defendants COMPASS USA SPE, LLC, COMPASS PARTNERS, LLC, BORIS  
24 PISKUN, and DAVID BLATT (hereinafter collectively referred to as "the Compass  
25 Defendants") by and through their counsel of record, Laxalt & Nomura, Ltd., hereby object to  
26 the Proposed Order Setting Supersedeas Bond Amounts to Stay Execution of Judgment Pending  
27 Appeal filed on August 26, 2011 by Plaintiffs (#2228).

1       A supersedeas bond pursuant to NRCP 62(b) for purposes of obtaining a stay of  
 2 execution pending appeal is a separate and distinct concept from a bond for costs incurred on  
 3 appeal pursuant to NRAP 7. As explained by the Second Circuit Court of Appeals:

4       Wright & Miller instruct that cost bonds and supersedeas bonds "should not be confused  
 5 ...." Wright, Miller & Cooper, 16A Federal Practice and Procedure: Jurisdiction 2d §  
 6 3953 at 278 (1996). It appears that a "supersedeas bond" is retrospective covering sums  
 7 related to the merits of the underlying judgment (and stay of its execution), whereas a  
 8 "cost bond" is prospective relating to the potential expenses of litigating an appeal. See  
*The Astoria v. Slayne*, 1 F.R.D. 742, 743 (E.D.N.Y. 1941) ("The bond filed was merely a  
 9 cost bond and not a supersedeas bond and was intended to cover costs in the appellate  
 10 court only." (citations omitted)).

11       *Adsani v. Miller*, 139 F.3d 67, 70 (2d Cir. 1998).

12       As discussed during the recent hearing of the Compass and Silar Defendants' motions to  
 13 determine the amount of any required appeal bonds, the Compass Defendants will likely elect ---  
 14 out of financial necessity --- not to file a supersedeas bond in order to obtain a stay of execution  
 15 on the forthcoming judgment pending appeal. Instead, they will likely file a bond for costs on  
 16 appeal to the extent one is required by this Court pursuant to NRAP 7. This Court stated that it  
 17 would require a separate bond for costs on appeal pursuant to NRAP 7, and set the amount of  
 18 that bond at \$100,000, comprised of \$5,000 in anticipated appellate costs and \$95,000 in  
 19 anticipated appellate attorney fees. By setting the amount of the NRAP 7 cost bond separately  
 20 from the amount of the NRCP 62(b) supersedeas bond, the Court will properly enable the  
 21 Compass Defendants to post the NRAP 7 cost bond, decline to post the separate NRCP 62(b)  
 22 supersedeas bond, and proceed with their appeal.

23       Contrary to this, Plaintiffs have proposed in their draft Order that the Court set only a  
 24 single bond amount. That bond purports to be an NRCP 62(b) supersedeas bond, but the  
 25 breakdown of the amount in the proposed Order expressly refers to anticipated appellate costs  
 26 and attorney fees. Accordingly, the proposed Order is vague as to whether the proposed single  
 27 bond amount pertains only to an NRCP 62(b) supersedeas bond, or to a combined NRCP 62(b)  
 28 supersedeas bond and an NRAP 7 cost bond.

29       The failure to post an NRAP 7 cost bond, if one is required by the Court, is not  
 30 necessarily fatal to an appeal but does empower the Ninth Circuit to dismiss the appeal. *Azizian*

1 *v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 961 (9th Cir. 2007). The Court stated during the  
2 hearing of this matter that it doubted the Compass Defendants could post the NRCP 62(b)  
3 supersedeas bond, and the undersigned agreed. That is precisely why the Court ought not  
4 combine the NRCP 62(b) bond with the NRAP 7 bond. The Compass Defendants must be  
5 apprized of the amount of the NRAP 7 cost bond, and given the opportunity to file only the  
6 NRAP 7 bond and not the NRCP 62(b) supersedeas bond if they so choose. By combining the  
7 two amounts, or leaving it unclear as to whether the amounts have been combined, this Court  
8 would unduly burden the Compass Defendants' right to appeal. See *Azizian*, 499 F.3d at 961  
9 (district court may not unduly burden a party's right to appeal by setting an excessive NRAP 7  
10 cost bond amount).

11 Accordingly, the Court's Order Setting Supersedeas Bond Amounts to Stay Execution of  
12 Judgment Pending Appeal should declare whether an NRAP 7 cost bond is also required, and if  
13 so, set the amount of that separate cost bond. If the Court is to enter an Order consistent with its  
14 stated position during the hearing of this matter, the Order should set the amount of the NRAP 7  
15 cost bond at \$5,000 for costs on appeal, and \$95,000 for anticipated appellate attorney fees.<sup>1</sup>

16 DATED this 30th day of August.

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<sup>1</sup> The Compass Defendants, of course, reserve the right to argue on appeal that the \$95,000 in anticipated appellate attorney fees should be included in the NRAP 7 cost bond amount.

## **CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of LAXALT & NOMURA, LTD., and that on this 30<sup>th</sup> day of August, 2011, I caused a true and correct copy of the foregoing to be served:

VIA ELECTRONIC SERVICE

addressed as follows:

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